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H.B. 344
2nd Sub. (Gray)

Representative Merrill F. Nelson proposes the following substitute bill:

UTAH MEDICAL CANDOR ACT

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Merrill F. Nelson

Senate Sponsor: Michael S. Kennedy

LONG TITLE

General Description:

This bill enacts the Utah Medical Candor Act.

Highlighted Provisions:

This bill:

- defines terms;
- creates a medical candor process where a health care provider may investigate an injury, or suspected injury, associated with a health care process and may communicate information about the investigation to the patient and any representative of the patient;
- addresses written notice of the medical candor process;
- addresses an offer of compensation made as part of the medical candor process;
- addresses confidentiality, disclosure, and effect of communications, materials, or information that is created for or during the medical candor process;
- addresses the confidentiality of factual information from a patient's medical record that is used or disclosed in the medical candor process;
- addresses the recording of communications during the medical candor process;
- addresses reporting requirements in relation to the medical candor process; and
- allows for the disclosure of deidentified information or data of an adverse incident

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for certain purposes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides revisor instructions.

Utah Code Sections Affected:

ENACTS:

78B-3-450, Utah Code Annotated 1953

78B-3-451, Utah Code Annotated 1953

78B-3-452, Utah Code Annotated 1953

78B-3-453, Utah Code Annotated 1953

78B-3-454, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-3-450** is enacted to read:

Part 4a. Utah Medical Candor Act

78B-3-450. Definitions.

As used in this chapter:

(1) "Adverse event" means an injury or suspected injury that is associated with a health care process rather than an underlying condition of a patient or a disease.

(2) "Affected party" means:

(a) a patient; and

(b) any representative of a patient.

(3) "Communication" means any written or oral communication made in preparation of or during the medical candor process.

(4) "Governmental entity" means the same as that term is defined in Section 63G-7-102.

(5) "Health care" means the same as that term is defined in Section 78B-3-403.

(6) "Health care provider" means the same as that term is defined in Section 78B-3-403.

(7) "Malpractice action against a health provider" means the same as that term is

defined in Section 78B-3-403.

(8) "Medical candor process" means the process described in Section 78B-3-451.

(9) "Patient" means the same as that term is defined in Section 78B-3-403.

(10) "Public employee" means the same as the term "employee" as defined in Section 63G-7-102.

(11) (a) Except as provided in Subsection (11)(c), "representative" means the same as that term is defined in Section 78B-3-403.

(b) "Representative" includes:

(i) a parent of a child regardless of whether the parent is the custodial or noncustodial parent;

(ii) a legal guardian of a child;

(iii) a person designated to make decisions on behalf of a patient under a power of attorney, an advanced health care directive, or a similar legal document;

(iv) a default surrogate as defined in Section 75-2a-108; and

(v) if the patient is deceased, the personal representative of the patient's estate or the patient's heirs as defined in Sections 75-1-201 and 78B-3-105.

(c) "Representative" does not include a parent of a child if the parent's parental rights have been terminated by a court.

(12) "State" means the same as that term is defined in Section 63G-7-102.

Section 2. Section **78B-3-451** is enacted to read:

78B-3-451. Medical candor process.

In accordance with this part, a health care provider may engage an affected party in a process where the health care provider and any other health care provider notified in Subsection 78B-3-452(1)(b) that chooses to participate in the process:

(1) conducts an investigation into an adverse event involving a patient and the health care provided to the patient;

(2) communicates information to the affected party regarding information gathered during an investigation described in Subsection (1);

(3) communicates to the affected party the steps that the health care provider will take to prevent future occurrences of the adverse event; and

(4) determines whether to make an offer of compensation to the affected party for the

adverse event.

Section 3. Section **78B-3-452** is enacted to read:

78B-3-452. Notice of medical candor process.

(1) If a health care provider wishes to engage an affected party in the medical candor process, the health care provider shall:

(a) provide a written notice described in Subsection (2) to the affected party within 365 days after the day on which the health care provider knew of the adverse event involving the patient;

(b) provide a written notice, in a timely manner, to any other health care provider involved in the adverse event that invites the health care provider to participate in the medical candor process; and

(c) inform, in a timely manner, any health care provider described in Subsection (1)(b) of an affected party's decision of whether to participate in the medical candor process.

(2) A written notice under Subsection (1)(a) shall:

(a) include an explanation of:

(i) the patient's right to receive a copy of the patient's medical records related to the adverse event; and

(ii) the patient's right to authorize the release of the patient's medical records related to the adverse event to any third party;

(b) include a statement regarding the affected party's right to seek legal counsel at the affected party's expense and to have legal counsel present throughout the medical candor process;

(c) notify the affected party that there are time limitations for a malpractice action against a health care provider and that the medical candor process does not alter or extend the time limitations for a malpractice action against a health care provider;

(d) if the health care provider is a public employee or a governmental entity, notify the affected party that participation in the medical candor process does not alter or extend the deadline for filing the notice of claim required under Section 63G-7-401;

(e) notify the affected party that if the affected party chooses to participate in the medical candor process with a health care provider:

(i) any communication, material, or information created for or during the medical

candor process, including a communication to participate in the medical candor process, is confidential, not discoverable, and inadmissible as evidence in a judicial, administrative, or arbitration proceeding arising out of the adverse event; and

(ii) a party to the medical candor process may not record any communication without the mutual consent of all parties to the medical candor process; and

(f) advise the affected party that the affected party, the health care provider, and any other person that participates in the medical candor process must agree, in writing, to the terms and conditions of the medical candor process in order to participate.

(3) If, after receiving a written notice, an affected party wishes to participate in the medical candor process, the affected party must agree, in writing, to the terms and conditions provided in the written notice described in Subsection (2).

(4) If an affected party agrees to participate in the medical candor process, the affected party and the health care provider may include another person in the medical candor process if:

(a) the person receives written notice in accordance with this section; and

(b) the person agrees, in writing, to the terms and conditions provided in the written notice described in Subsection (2).

Section 4. Section **78B-3-453** is enacted to read:

78B-3-453. Nonparticipating health care providers -- Offer of compensation -- Payment.

(1) If any communications, materials, or information in any form during the medical candor process involve a health care provider that was notified under Subsection 78B-3-451(1)(b) but the health care provider is not participating in the medical candor process, a participating health care provider:

(a) may provide only materials or information from the medical record to the affected party regarding any health care provided by the nonparticipating health care provider;

(b) may not characterize, describe, or evaluate health care provided or not provided by the nonparticipating health care provider;

(c) may not attribute fault, blame, or responsibility for the adverse event to the nonparticipating health care provider; and

(d) shall inform the affected party of the limitations and requirements described in Subsections (1)(a), (b), and (c) on any communications, materials, or information made or

provided by the participating health care provider in regards to a nonparticipating health care provider.

(2) (a) If a health care provider determines that no offer of compensation is warranted during the medical candor process, the health care provider may orally communicate that decision to the affected party.

(b) If a health care provider determines that an offer of compensation is warranted during the medical candor process, the health care provider shall provide the affected party with a written offer of compensation.

(3) If a health care provider makes an offer of compensation to an affected party during the medical candor process and the affected party is not represented by legal counsel, the health care provider shall:

(a) advise the affected party of the affected party's right to seek legal counsel, at the affected party's expense, regarding the offer of compensation; and

(b) notify the affected party that the affected party may be legally required to repay medical and other expenses that were paid by a third party, including private health insurance, Medicare, or Medicaid.

(4) (a) All parties to an offer of compensation shall negotiate the form of the relevant documents.

(b) As a condition of an offer of compensation under this section, a health care provider may require an affected party to:

(i) execute any document that is necessary to carry out an agreement between the parties regarding the offer of compensation; and

(ii) if court approval is required for compensation to a minor, obtain court approval for the offer of compensation.

(5) If an affected party did not present a written claim or demand for payment before the affected party accepts and receives an offer of compensation as part of the medical candor process, the payment of compensation to the affected party is not a payment resulting from:

(a) a written claim or demand for payment; or

(b) a professional liability claim or a settlement for purposes of Sections 58-67-302, 58-67-302.7, 58-68-302, and 58-71-302.

Section 5. Section **78B-3-454** is enacted to read:

78B-3-454. Confidentiality and effect of medical candor process -- Recording of medical candor process -- Exception for deidentified information or data.

(1) All communications, materials, and information in any form specifically created for or during a medical candor process, including the findings or conclusions of the investigation and any offer of compensation, are confidential and privileged in any administrative, judicial, or arbitration proceeding.

(2) Any communication, material, or information in any form that is made or provided in the ordinary course of business, including a medical record or a business record, that is otherwise discoverable or admissible and is not specifically created for or during a medical candor process is not privileged by the use or disclosure of the communication, material, or information during the medical candor process.

(3) (a) Any factual information that is required to be documented in a patient's medical record under state or federal law regarding accidents, injuries, complications, hospital-acquired infections, or reactions to medications, treatments, or anesthesia is not privileged by the use or disclosure of the factual information during the medical candor process.

(b) Factual information described in Subsection (3)(a) does not include an individual's mental impressions, conclusions, or opinions that are used or disclosed in a medical candor process.

(4) A communication or offer of compensation made in preparation for or during the medical candor process does not constitute an admission of liability.

(5) Nothing in this part alters or limits the confidential, privileged, or protected nature of communications, information, memoranda, work product, documents, and other materials under other provisions of law.

(6) (a) Notwithstanding Section 77-23a-4, a party to a medical candor process may not record any communication without the mutual consent of all parties to the medical candor process.

(b) A recording made without mutual consent of all parties to the medical candor process may not be used for any purpose.

(7) (a) Notwithstanding any other provision of law, any communication, material, or information created for or during a medical candor process:

(i) is not subject to reporting requirements by a health care provider; and

(ii) does not create a reporting requirement for a health care provider.

(b) If there are reporting requirements independent of, and supported by, information or evidence other than any communication, material, or information created for or during a medical candor process, the reporting shall proceed as if there were no communication, material, or information created for or during the medical candor process.

(c) This Subsection (7) does not release an individual or a health care provider from complying with a reporting requirement.

(8) (a) A health care provider that participates in the medical candor process may provide deidentified information or data about an adverse incident to an agency, company, or organization for the purpose of research, education, patient safety, quality of care, or performance improvement.

(b) Disclosure of deidentified information or data under Subsection (8)(a):

(i) does not constitute a waiver of a privilege or protection of any communication, material, or information created for or during a medical candor process as provided in this section or any other provision of law; and

(ii) is not a violation of the confidentiality requirements of this section.

Section 6. **Revisor instructions.**

The Legislature intends that the Office of Legislative Research and General Counsel, in preparing the Utah Code database for publication, not enroll this bill if H.J.R. 13, Joint Resolution Amending Court Rules of Procedure and Evidence to Address the Medical Candor Process, does not pass.